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ABSTRACT

The focus of this paper is the extent to which the judiciary sets the tone for freedom of speech in educational environment, and in so doing, helps define educational institutions themselves. In particular, the paper examines what the federal courts have said about the roles and obligations of educators when dealing with the rights of public school and college students. The paper uses the current controversy regarding politically correct speech to contrast the federal judiciary's different approaches to free speech cases at the high school and college level, both in landmark cases and in recent rulings from the United States Supreme Court and from lower courts. It focuses attention on the educational philosophy reflected in the federal court decisions. The paper begins with significant pre-1980 high school cases, then looks at cases that set the tone for free expression in colleges during the same period, showing that these early cases defined both schools and colleges as educational environments meant to foster student participation in a democratic society. The paper then examines cases since 1980 that define high schools and colleges as fundamentally different in purpose, with a focus on protection of students' expressive rights in college cases and the emphasis on assigning regulatory discretion to school officials in high school cases. The paper concludes with a discussion of free speech implications of current judicial philosophy. Seventy-three endnotes are included. (SR)

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The Federal Courts and Educational Policy:

Paternalism, Political Correctness and Student Expression

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courts have offered guidance to educators balancing competing interests. As the pace of judicial involvement increased during the past two decades,[2] educators--especially at the high school level--complained of judicial interference.[3] Part of the frustration during this period came from a judicial shift in focus to the rights of students, in sharp contrast to an earlier *in loco parentis* philosophy that stressed administrators' rights.[4]

As *in loco parentis* waned, the judicial message to university personnel became matter-of-fact: college-age students have First Amendment rights coextensive with those of adults.[5] This did not eliminate free-speech controversies on campuses, but it made the judicial outcomes more predictable and university administrators arguably less combative and less paternal.

The extent to which the judiciary sets the tone for freedom of speech in the educational environment--and in so doing helps define educational institutions themselves--is the focus of this paper. In particular, it will look at what the federal courts have said about the roles and obligations of educators when dealing with the rights of public school and college students.

FOCUS AND METHODOLOGY

This paper will use the current controversy regarding politically correct speech to contrast the federal judiciary's

different approaches today to free speech cases at the high school and college level. The analysis will build on the messages federal courts have given to high school and university officials in landmark cases and recent rulings.

This study will look at U.S. Supreme Court cases concerning free speech in high school and college, as well as recent lower-court rulings that reveal disparities in how courts today perceive educational policy at the secondary and post-secondary levels. The political correctness controversy will be used to reveal implications of the dichotomous judicial philosophies.

Attention will focus on the educational philosophy reflected in the federal court decisions. The paper will begin with significant pre-1980 high school cases, then look at cases that set the tone for free expression in colleges during the same period. These early cases define both schools and colleges as educational environments meant to foster student participation in a democratic society. The paper then examines cases since 1980 that define high schools and colleges as fundamentally different in purpose. The paper will conclude with a discussion of free-speech implications of current judicial philosophy.

A CONTROVERSIAL CONTEMPORARY CONTEXT

Political Correctness, a tired, over-simplified and almost trite term for a very serious phenomenon, nonetheless provides a

useful context for examining judicial influence over educational institutions.

Lori Davis, of Southern Illinois University-Carbondale's Women's Studies Programs, defines Political Correctness in a way that seems to support diversity and "respect for the lives and values in a complex, pluralistic world." The focus, she says, is "respect for others through...words and actions."[6]

The term Political Correctness has implications for both more expression and less. Advocates of diversity and multi-culturalism call for increased awareness and sensitivity and a broadening of education and experience. When efforts to mandate respect, fairness and civility lead to sanctions against speech that does not conform to these prescriptions, civil libertarians argue that expression is chilled.[7]

Most often discussed within the college setting, PC exists in the public schools as well, as the definition above suggests. Columnist Ellen Goodman, writing two days after last year's Bill of Rights bicentennial, professed sadness at the American public's reluctance to "say what they think." It exists on college campuses, Goodman noted, but begins far earlier. "While children learn in grade school to read and write," she said, "they often unlearn how to speak their minds."[8]

As with many controversies, the one involving political correctness has valid concerns on both sides. Some believe that

school officials are obligated to protect potential victims of harmful or hurtful speech and provide a model environment during the years young people form adult attitudes and learn adult behavior. Others argue that the threat of punishment for often-undefined "inappropriate" expression chills speech, stifles critical thinking and contradicts the marketplace-of-ideas notion central to a democratic society.

When the balancing of competing interests involves a constitutional question that cannot be resolved in a public school or university setting, the conflict may shift to the courtroom. In a controversy involving censorship or punishment of inappropriate expression in a high school or college, the federal courts will decide whether the institution's rules or the school officials' actions are justified.

Three contextual variables have been factors in previous court decisions:

(1) The ages of the students. (The courts have historically noted the relative immaturity of high school pupils and have equated college students with adults in First Amendment cases.)

(2) The school environment. (Discipline and control of behavior are more important in the confines of a public school than in the more open environment of a university campus. To provide an effective learning environment, therefore, public school officials have been given more latitude to regulate speech

activities in a high school setting.)

(3) The responsibility of school officials. (The civic mission of our educational institutions and the traditional roles of educators in fulfilling that mission have been factors in court decisions affecting education.)

THE LEGAL CONTEXT

An indisputable role of education is to help instill the values of productive citizenship. What makes a "good citizen," however, and how educators can foster such development are open to interpretation. Although the federal courts give some breathing room to the school officials who define citizenship values, and often defer to the educators' expertise,[9] judges remain guardians of a principle embedded in six decades of free-speech cases. That precept, ironically, was solidified in a case dealing with offensive speech.

The state of Minnesota tried to legislate correctness in 1925 when it passed a Public Nuisance Bill that condemned lewd, lascivious, malicious or scandalous publication. Speech went unprotected, the bill said, unless it was true and "published for good motives and for justifiable ends."[10]

The Minnesota Supreme Court, upholding the law and censorship of Jay Near and his Minnesota Press, wrote that

> "...our constitution was never intended to protect malice, scandal and defamation when untrue or published

> with bad motives or without justifiable ends. It is a shield for the honest, careful and conscientious press."[11]

But the U.S. Supreme Court disagreed in 1931, declaring in Near v. Minnesota that restrictive rule-making carries with it a heavy presumption that restraint on expression is unconstitutional.[12]

Near and most cases that have reinforced it by condemning censorship since 1931 have not been school cases, however. And freedom from censorship is not absolute. Speech that may not be stopped still may be regulated, as long as certain procedures are followed:

* Regulations limiting expression must clearly indicate when and to whom they apply, and alternative outlets must be available;
* There is to be no arbitrary action against a person, organization or expression the government does not like;
* A legitimate state interest in regulation is needed--one that the government can show outweighs the reason to speak;
* Speech is protected, but conduct is not;
* Finally, speech closely tied to illegal action is not protected, but only if face-to-face confrontation incites an immediate breach of the peace or imminent lawlessness.

The U.S. Supreme Court has said that these First Amendment principles apply to high school and college students as well as to other American citizens.[13] But the extent to which the age, school environment and responsibility of school officials affect

the courts decisions can be clear only by examining school cases. The next section includes such an examination, focusing on how judges today define the role of educational institutions and their officials, and reconcile this judicial position with the obligation to protect the First Amendment rights of all citizens.

LEGAL GUIDANCE

Early High School Cases

> "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operations of school systems."[14]

This hands-off statement by the U.S. Supreme Court in Epperson v. Arkansas reflects a philosophy presumed to guide the judiciary prior to the 1970s and still considered by many an appropriate position. Even in the 1943 landmark student-rights case of West Virginia State Board of Ed. v. Barnette, the High Court expressed its reluctant involvement. But it overcame this reticence by raising freedom of expression above the public school context to that of society and the U.S. Constitution. In the words of Justice Jackson:

> "We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgement that history authenticates as the function of this Court when liberty is infringed."[15]

The Court then forbade schools from punishing students who, without fanfare or disruption, refused to pledge allegiance to

the flag because the oath conflicted with their personal beliefs. The Court ruled unconstitutional a policy that suspended students who refused to recite the pledge of allegiance. In a series of statements, the Court told school officials that their policies and practices should be constitutionally consistent with those regulating society.

Educational philosophy that emerges from West Virginia v. Barnette calls for tolerance: "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes."[16]

Almost 50 years before Political Correctness became coined verbal exchange in education, the Supreme Court cautioned that enforcement of PC is incompatibile with a fundamental constitutional principle:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion...."[17]

Balancing the responsibilities of school officials and the rights of students, the Court placed a higher value on an educational environment that reflects the values of individual freedom than on one that mandates allegiance to a belief, albeit a worthy one (loyalty and patriotism through allegiance to the flag). Boards of Education, the Court said,

> "have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[18]

The Supreme Court attacked another high school policy 16 years later in language stronger than, yet mindful of, West Virginia v. Barnette. In Tinker v. Des Moines Ind. School Dist. the Court acknowledged that the school's educational mission and special environment justify reasonable regulation of student behavior.[19] But the Supreme Court once again put greater emphasis on individual rights and placed the spirit and substance of the school's mission on a higher plane than a well-intentioned policy contrary to constitutional principles. The beliefs of Mary Beth and John Tinker and their friend Christopher Eckhardt, reflected in the black armbands they wore to protest the Vietnam War, could not be suppressed because apprehensive school officials feared such conduct would disrupt the school.[20]

The Court placed on school officials the burden of justifying regulation of expression in the school and cautioned them not to punish expression solely because authorities disapprove of the beliefs. The Court rejected the notion that public schools should foster homogeneity.[21] In the words of Justice Fortas, "Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent

government has provided as a safe haven for crackpots."[22]

Although the Tinker philosophy gradually found its way into federal court rulings and many public schools and universities during the 1970s and early 1980s, the judiciary never lost sight of school officials' traditional in loco parentis role. In his concurring opinion in Tinker, in words that would gain meaning with the later cases of Bethel School Dist. v. Fraser[23] and Hazelwood School Dist. v. Kuhlmeier,[24] Justice White revealed his willingness to give more discretion to school officials who, for "a valid state interest," disciplined students for communicative acts short of substantially disrupting the school.[25]

Early College Cases

Free speech cases on the university campus during the late 1960s and 1970s paralleled high school litigation, but with more consistency and predictability.[26] Because courts viewed college-age students as adults, and the campus as training ground for a free society, rights accorded all citizens through First Amendment rulings were more easily applied and more readily accepted. Adult status also minimized judicial attention to the age/maturity factor that clouds high school cases and to the institution's paternal responsibilities. Finally, the campus environment did not require as much control and regimentation to guarantee fulfillment of the university's educational mission.

For any or all of these reasons, college free-speech rulings

revealed little judicial tolerance for suppression or punishment of ideas permissible in society at large. Beginning with the earliest college press cases, courts put disciplinary rules and instruments of institutional control second to the values of freedom and the role of higher education.

In Dickey v. Alabama State Board of Education, the first college press rights case, a federal district court noted that without evidence that expression disrupted the educational process, Troy State College officials had no business using a rule to punish someone who criticized the governor or state legislature.[27] In noting that student newspaper editor Gary Dickey was unconstitutionally expelled, the court addressed the mission of higher education this way:

> "...establishment of an educational program requires certain rules and regulations necessary for maintaining an orderly program and operating the institution in a manner conducive to learning. However, the school and school officials have always been bound by the requirement that the rules and regulations must be reasonable."[28]

As for weighing administrative power, the court said that the administration's argument here for disciplining Dickey "completely ignores the greater damage to college students that will result from the imposition of intellectual restraints."[29]

U.S. Supreme Court decisions in 1972 and 1973 affirmed the reasoning of Dickey and Tinker. In Healy v. James, the Court said that a prospective student organization's link to a national

group with a philosophy of disruption and violence was insufficient reason to deny the local group status as a campus organization.[30] Recognizing a valid state interest in maintaining an environment "free from disruptive interference with the educational process,"[31] the Court nonetheless put the campus free-speech issue into a larger context. "The precedents of this Court," Justice Powell wrote, "leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."[32]

Addressing a concern so much a part of today's debate over control of insensitive speech on campus, the High Court noted that the Constitution protects expression despite a "risk to the maintenance of civility and an ordered society."[33]

Although campus speech and conduct codes related to the current PC controversy have not found their way to the Supreme Court, a case involving violation of a conduct code <u>did</u> reach the Court 19 years ago. The University of Missouri's Code of General Standards of Student Conduct required students "to observe generally accepted standards of conduct" and specifically prohibited "indecent conduct or speech."[34]

Upholding the expulsion of a graduate student whose underground newspaper depicted police officers raping the Statue of Liberty and carried a headline that read "Motherfucker

Acquitted," the Eighth Circuit Court of Appeals found free-speech interests subordinate to "conventions of decency" on campus.[35]

But in a 6-3 per curiam ruling, the Supreme Court overturned the Eighth Circuit's decision, citing Healy and emphatically declaring that "the mere dissemination of ideas--no matter how offensive to good taste--on a state university campus may not be shut off in the name alone of 'conventions of decency.'" Applying acceptable procedures for regulating expression off campus, the Court matter-of-factly said that authorities may control the time, place and manner of expression, but may not punish a student because they disapprove of the content of non-disruptive speech.[36]

* * * * *

By the end of the 1970s, the federal courts had said to high school and college officials alike that the values of free speech justify protection of individual expression at both levels. Recognizing qualifiers to that freedom in the public schools, the federal courts had been busy resolving school/student struggles over ways to define and exercise a free-speech right that school officials were grudgingly acknowledging.[37]

At the college level, meanwhile, judges seemed to show little deference to the argument that a university's environment and mission justify special consideration in free-speech cases. Public-university officials had been told that they bear a burden

similar to that of any public official who wants to suppress or punish expression--that of justifying their actions. The courts implied that just as public officials may control citizens only through narrow, content-neutral laws that regulate but do not suppress protected speech, so may college officials promote civility and punish students only through speech and conduct codes that would withstand a constitutional challenge off campus.

THE CURRENT LEGAL CLIMATE

Recent College Cases

By the mid-1980s, colleges and universities pressured to address insensitivity and intolerance on campus[38] began looking for a way to get the federal courts to consider the university's mission and special environment more than they had earlier. University officials turned to written regulations, what appeared to be the only available court-sanctioned tool to regulate expression. What they encountered were the same frustrations that high schools administrators had in the 1970s when one court after another ruled unconstitutional those well-intentioned but vague and overbroad guidelines designed to control expression.[39]

When an increasing number of overt incidents of racism and bigotry surfaced on college campuses in the 1980s, many school officials felt that doing nothing would suggest they condone verbal harassment.[40] Aware of legal constraints on curtailing

expression, colleges defined harassment as conduct and added sanctions to the institution's disciplinary policies. Although the federal courts had rejected high school disciplinary policies that too broadly chilled expression, university policy makers relied on a position common in high school cases but one that federal courts had been unwilling to take in college free-speech cases. Judges were asked to consider the formative age of college students and to weigh more heavily both the campus environment and the responsibility of university officials to help shape the values of young adults.

In three recent cases, however, federal district courts refused to change the position that the U.S. Supreme Court took in Healy and Papish--that the state university is bound by the same First Amendment constraints of other public institutions.

The University of Michigan's anti-discrimination policy brought the first court challenge of a so-called "hate speech" regulation. In Doe v. University of Michigan, the court would not give school officials the discretionary power to implement a vague and overbroad policy, despite what the court acknowledged were valid motives for such a policy.[41] Applying Supreme Court precedence, the Michigan court said the university could not prohibit speech it disagreed with, even if the speech "was found to be offensive, even gravely so, by large numbers of people."[42]

The district court clearly was not prepared to remove the

university from its societal context. Free-speech principles, the court said, "acquire a specific significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission."[43] Nor was the court ready to place decisionmakers' rights above those of the governed. In Judge Cohn's words:

> "While the Court is sympathetic to the University's obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech."[44]

The University of Wisconsin System's Board of Regents went to federal court in 1991 to defend a more narrow policy than Michigan's. Wisconsin used the same rationale and legal arguments the University of Michigan used, but believed its code was valid because it punished only those who aimed racial slurs and epithets at <u>specific individuals</u>. The district court was not persuaded.

In October of 1991, Judge Warren found Wisconsin's speech code overbroad. And he refused to depart from what was a fairly predictable position in campus free-speech cases: Government--or a state university Board of Regents--has no power to restrict expression because it does not like the message, and any content-based restrictions must be narrow and well-defined.[45]

To the regents' claim that hate-speech has "minimum social value" and "harmful effects," the court countered with a marketplace-of-ideas defense. The Constitution "does not make

the dominance of truth a necessary condition of freedom of speech,"[46] the court said, adding that a code with content-based restrictions on speech "limits the diversity of ideas among students and thereby prevents the 'robust exchange of ideas' which intellectually diverse campuses provide."[47]

George Mason University, with no written guidelines in 1991, but administrators committed nonetheless to a civil campus environment, received a terse, three-page memorandum opinion from the district court after the school disciplined fraternity members for dressing as "ugly women" during a skit on campus.

Once again, a federal court rebuffed a university's paternal behavior and its administrators' view that good motives justified punishment of offensive expression.[48] Concern that "exposure to a given group's ideas may be somehow harmful to certain students" does not alone warrant university interference, the court said,[49] adding that there are no First Amendment exceptions for "bigotry, racism and religious intolerance or ideas on matters some may deem trivial, vulgar or profane."[50]

In language usually reserved for the community at large but heard consistently in college free-speech cases as well, the court said that the controversy over the offensive skit "is consistent with [the university's] educational mission in conveying ideas and promoting the free flow and expression of those ideas." Because the university may not suppress or punish

expression it finds offensive, the court said, the "marketplace of ideas" philosophy should also guide the school's response.[51]

Absent a U.S. Supreme Court decision to modify or supersede Healy and Papish, the federal courts appear content to hold state university administrators accountable to the First Amendment constraints on other public officials. Despite recent campus turmoil and administrators' angst over hate speech and ways to combat it, the courts seem unmoved to consider the college environment or mission worthy of much special First Amendment consideration. If anything, the federal courts seem moved to allow more breathing room on campus than off.

Recent High School Cases

Such cannot be said of the high school setting, where the U.S. Supreme Court has given school officials--and judges--more discretion in First Amendment cases. Ten years ago the federal courts examined policies and practices of high schools and colleges within the common context of freedom of expression for the individual. Today, only college cases are consistently approached from that perspective. The U.S. Supreme Court, in two recent high school cases, has shifted the First Amendment focus from the individual applying societal values to the authorities instilling institutional values. In so doing, the Court has addressed educational policy from a perspective that reshapes the judiciary's view of the mission of public school education.

Then-Chief Justice Warren Burger and Justice William Rehnquist, dissenting in the Papish decision that protected an offensive underground newspaper on campus, suggested the theme that permeates two recent high school cases. The university, Justice Burger wrote in 1973, is an institution

> "where individuals learn to express themselves in acceptable, civil terms. We provide that environment to the end that students may learn the self-restraint necessary to the functioning of a civilized society and understand the need for those external restraints to which we must all submit if group existence is to be tolerable."[52]

The Supreme Court has not yet embraced this view in any college free-speech case, but it did so in two high school cases--Bethel School Dist. v. Fraser[53] and Hazelwood School Dist. v. Kuhlmeier.[54] And Justice Burger, writing for the majority in Bethel, applied his Papish philosophy to the high school.

The Court used both the content and the context of the speech to distinguish Bethel from Tinker. The earlier case dealt with purely political speech--protest of the Vietnam War--while Bethel concerned a student's two-minute public speech that used sexual innuendo. More important to the Court, Tinker dealt with three students who independently chose to express themselves by wearing black armbands. Matthew Fraser, meanwhile, used a school-sponsored student assembly to deliver a tongue-in-cheek campaign speech that had students giggling, if not blushing.

These differences provided the Court with a basis for

enunciating a new legal framework for examining school cases. The Justices used the platform to set forth an educational philosophy that in Tinker engendered no more than a dissent from Justice Hugo Black. But the majority opinions in both Bethel and Hazelwood cited Justice Black's dissent as a cornerstone of their reasoning. Black had argued that the U.S. Constitution does not compel school officials to "surrender control of the American public school system" to high school students, immature and unbridled in a "new revolutionary era of permissiveness."[55]

By the mid-1980s, the Supreme Court was once again about to balance student rights with the authority of school officials. This time, the Court said expressive rights diminish when the speaker enters a public school, while school regulations represent "society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[56]

After 17 years of school officials having to meet a First Amendment burden to justify suppression or punishment, the Court was shifting responsibility to the speaker. Public education is supposed to instill moral values, the Court said, and students' First Amendment rights must bow to this cherished standard. In Bethel, the Court made this point clearly, and often:

* "The role and purpose of the American public school system...must inculcate the habits and manners of civility as values in themselves."[57]

* "The inculcation of these values is truly 'the work of the schools.'"[58]

* "The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech...would undermine the school's basic educational mission."[59]

* "...it was perfectly appropriate for the school to disassociate itself to make the point that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."[60]

In earlier high school cases, school officials were told to be tolerant, and that they could not censor non-disruptive expression merely because they feared it or disagreed with it. In Bethel, however, the Court said that because "educating our youth for citizenship" extends beyond the classroom, schools must "teach by example."[61] That means that, unlike their counterparts on college campuses, high school administrators do not have to--indeed should not--tolerate "lewd, indecent, or offensive speech and conduct," but instead should prohibit "vulgar and offensive terms in public discourse."[62] And as for a set of narrow rules similar to the speech and conduct codes under which college officials operate, the Court said that discretionary power is more important because of the "wide range of unanticipated conduct disruptive of the educational process."[63]

Bethel told high school officials they should instill the values of civility, and gave educators the authority to determine which values to stress and how to enforce them. As the National Association of Secondary School Principals told its members,

> "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive

> terms in public discourse, and that determination of what manner of speech is inappropriate in school properly rests with the school board (and, by delegation, its employees)."[64]

The NASSP, interpreting Bethel as a broad mandate, told its members the Court would support other "affirmative as well as restrictive" action that would inculcate fundamental values.[65]

Not only does this contrast sharply with the Court's earlier First Amendment philosophy, but it is at odds with the judicial message to college officials. Two years later, in Hazelwood, the Court even more firmly placed educational mission, the school environment and the authority of school officials at the forefront of First Amendment confrontations with students. Democratic notions such as the marketplace of ideas were relegated to dissenting opinions.

School-sponsored expression was once again an issue when the principal of Hazelwood East High School removed from the student newspaper two stories he believed to be an invasion of privacy. The Supreme Court scarcely addressed the content of the stories, turning instead to the role of school officials in regulating such expression.

Justice White, who in a concurring opinion 19 years earlier in Tinker expressed discomfort with holding school officials to a burden of "substantial disruption" in free-speech cases,[66] wrote a majority opinion in Hazelwood that gave school officials much more breathing room.

As it did in Bethel, the Court once again focused on the role and functions of administrators as school officials within an educational institution, not, as it had in prior years, on students in a free society and administrators as public officials serving a democratic society.

Mindful of the "emotional maturity" of an intended audience, educators have broad authority over school-sponsored expression, which they may regulate "in any reasonable way."[67]

One indication of the Court's new focus is the authority it gave school officials over both "style and content" of student speech. Whereas public officials traditionally must overcome serious obstacles before they can censor, the Court gave educators the discretionary control over any expression "reasonably related to legitimate pedagogical concerns" of the school.[68] Administrative discretion includes the ability to set high standards for the quality of student speech,[69] and enforce those standards without being confined by written guidelines.[70]

At what point do First Amendment considerations overshadow school concerns? The Court said that it is only when censorship "has no valid educational purpose that the First Amendment is so directly and sharply implicated as to require judicial intervention to protect students' constitutional rights."[71]

CONCLUSIONS AND IMPLICATIONS

Bethel and Hazelwood raise some interesting, unanswered questions about student expression in high school and on the college campus.

--Does the shift in emphasis and tone of recent high school cases suggest a return to the pre-Tinker days of in loco parentis, where courts will be less likely to intevene in school affairs?

--Or do these cases merely refine the lines of control, giving school officials control over school-sponsored expression, reserving the First Amendment for individual student expression?

--Will the Supreme Court, which has been silent on the free-speech rights of college students, apply the principles of Hazelwood to higher education?[72]

Recent federal cases reflect a stark contrast between the focus on protection of students' expressive rights in college cases and the emphasis on regulatory discretion to school officials in high school cases. Yet this final question carries implications beyond the courtroom.[73]

Depending upon your perspective, the discrepancy in judicial perspectives may either ease or exacerbate the campus controversy on political correctness. One view suggests that strengthening the control and discretion of high school decision makers will increase the sensitivity of students and therefore reduce the likelihood of eruption in college. If school officials can set and enforce standards of civil discourse and behavior without

fearing court intervention for thwarting the free-speech rights of students, such structure will embed correctness and encourage civil behavior.

A second view would argue that a rigidly controlled high school environment will simply serve as a pressure cooker for suppressed beliefs that will erupt once a student gets to the starkly different college environment.

A third, middle ground suggests that high school students need some freedom to express feelings while they are learning the lessons of civility and tolerance. Unable to experience some of the personal liberties discussed abstractly in the classroom, this view implies, students may become confused or cynical and retreat from active citizenship.

The federal courts, through action or inaction, undoubtedly influence educational policy. Inconsistent judicial application of the First Amendment to our educational institutions and to the students they serve sends conflicting messages educators, to the young and to the public. Judges, lawmakers, parents, educators and students--each shares responsibility for determining whether ideas will fester amid frustration, explode in wanton disregard, or shrivel and die from neglect.

ENDNOTES

1See, e.g., Epperson v. Arkansas, 393 U.S. 97 (1968).

2See Louis E. Ingelhart, Press Law and Press Freedom for High School Publications (New York: Greenwood Press, 1986) and the Student Press Law Center's Law of the Student Press (Washington, D.C.: Student Press Law Center, 1985).

3See, e.g., K.D. Moran and M.A. McGhehey. The Legal Aspects of School Communications (Topeka, Kansas: National Organization on Legal Problems of Education, 1980) and "U.S. Supreme Court Reviews Student Freedom of Speech: Bethel School District v. Fraser." A Legal Memorandum, National Association of Secondary School Principals Association, September 1986.

4See Nancy L. Thomas, "The New In Loco Parentis." Change, Vol. 23, September/October 1991, pp. 33-39.

5See e.g., Healy v. James, 408 U.S. 169 (1972), and Papish v. Board of Curators of the University of Missouri, 410 U.S. 667 (1973).

6Lori Davis, "What Does PC Stand For, Anyway? -- Pretty Confusing?" Political Correctness: Who Controls the Metaphors? A reprint of discussion during a Women's Studies Program Colloquium at Southern Illinois University-Carbondale, November 1991, p. 6.

7Lee A. Daniels, "Diversity, Correctness, and Campus Life: A Closer Look." Change, Vol. 23, September/October 1991, pp. 16-20.

8Ellen Goodman, "Speak Out, America--It is Your Right," Philadelphia Inquirer, December 17, 1991, p. 11A.

9Epperson, supra note 1.

10See Near v. Minnesota, 283 U.S. 697 (1931), and Fred W. Friendly, Minnesota Rag (New York: Vintage Books, 1981).

11Minnesota v. Near, 228 N.W. 326 (MN 1929).

12Near, supra note 10.

13See West Virginia State Board of Curators v. Barnette, 319

U.S. 624 (1943); Tinker v. Des Moines Ind. School Dist., 309 U.S. 503 (1969); Healy, supra note 5; and Papish, supra note 5.

14Epperson, supra note 1 at 104.

15West Virginia, supra note 13 at 640.

16Id. at 641-642.

17Id. at 642.

18Id. at 637.

19Tinker, supra note 13 at 513.

20Id. at 508-509.

21Id. at 511.

22Id. at 513.

23106 S.Ct. 3159 (1986).

24108 S.Ct. 562 (1988)

25Tinker, supra note 13 at 515.

26See Robert Trager and Donna L. Dickerson. College Student Press Law, 2nd Ed. (Athens, Ohio: National Council of College Publications Advisers, 1979).

27273 F.Supp. 613 (M.D.Ala. 1967).

28Id. at 618.

29Id. at 619.

30408 U.S. 109 (1972).

31Id. at 171.

32Id. at 180.

33Id. at 194.

34Papish, supra note 5 at 668.

35Papish v. Bd. of Curators, 464 F.2d 136, 145 (8th Cir. 1972).

36Papish, supra note 5 at 670.

37See Moran and McGhehey, supra note 3.

38Joan Wallach Scott, "The Campaign Against Political Correctness: What's Really at Stake?" Change, Vol. 23, November/December 1991, pp. 30-43.

39See Leon Letwin, "Administrative Censorship of the Independent Student Press--Demise of the Double Standard?" 28 South Carolina Law Review 5, March 1977, pp. 565-585.

40See Susan Dodge, "Campus Codes that Ban Hate Speech are Rarely Used to Penalize Students." Chronicle of Higher Education, February 12, 1992, pp. A35-36.

41721 F.Supp. 852 (E.D.Mich. 1989).

42Id. at 863.

43Id.

44Id. at 868.

45UWM Post v. Bd. of Regents of the University of Wisconsin System, 1991 WL 20681 (E.D.Wis. 1991).

46Id. at 12.

47Id. at 13.

48Sigma Chi Fraternity v. George Mason University, 775 F.Supp. 792 (E.D.Va. 1991).

49Id. at 793.

50Id. at 794.

51Id. at 793.

52Papish, supra note 5 at 672.

53Bethel, supra note 23.

54Hazelwood, supra note 24.

55Tinker, supra note 13 at 518.

56Bethel, supra note 23 at 3163.

57Id.

58Id. at 3164.

59Id. at 3165.

60Id.

61Id. at 3164.

62Id.

63Id. at 3166.

64A Legal Memorandum, supra note 3 at 4.

65Id. at 6.

66Tinker, supra note 13 at 515.

67Hazelwood, supra note 24 at 569-570.

68Id. at 571.

69Id. at 570.

70Id., footnote 6 at 571.

71Id. at 571.

72As the recent post-Hazelwood cases on speech codes reveal, lower courts have not applied the high school cases to the university setting. In footnote 7 of Hazelwood, [id. at 571], the Court says only that "We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university levels."

73E.g., it is not hard to find in Hazelwood leverage for institutionalizing Politically Correct speech in the high school. The Court said that school control over "biased or prejudiced" speech is appropriate [at 570] and argued that school officials might prefer to dissolve their student newspapers rather than open them to "racially intemperate, or personally insulting" expression [footnote 9 at 572].